84-1527

No. 84-_____

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MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

UNITED STATES OF AMERICA, - - Respondent,

versus

HARRY S. STONEHILL and
ROBERT P. BROOKS, - - - - Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

During a post-trial hearing held at the direction of the United States Court of Appeals for the Ninth Circuit following perfection of an appeal, a United States District Court stated that it had erred and relied upon matters which were not in evidence in making its findings that the Petitioners were liable to the Government for taxes. In affirming a decision denying relief from judgment based upon the admitted lack of evidence to support the findings of tax liability, the Ninth Circuit determined that these statements by the District Court did not constitute concessions of error. The question thus presented is:

> Whether the decision below frustrates the principle embodied in the Due Process Clause of the Fifth Amendment that a judgment must be based on evidence by sanctioning a judgment, now in excess of twenty million dollars, which the trial court itself stated was based on matters not in evidence.

PARTIES TO THE PROCEEDINGS

Petitioners are HARRY S. STONEHILL and ROBERT P. BROOKS.

Respondent is the UNITED STATES OF AMERICA.

All other parties formerly interested in the litigation waived participation and notice while the matter was pending in the Ninth Circuit Court of Appeals. These persons are:

Lourdes Blanco Stonehill

Pacita C. Brooks

Trammell, Rand, Nathan & Lincoln

Lourdes Blanco Stonehill Children's Trust

Elizabeth Ann Stonehill and the Elizabeth Ann Stonehill Trust

Susan Jane Stonehill and the Susan Jane Stonehill Trust

Harry Steven Stonehill, Jr. and the Harry Steven Stonehill, Jr. Trust

Michael Joseph Stonehill and the Michael Joseph Stonehill Trust

Pacita C. Brooks Children's Trust

Mary Jane Brooks Moore

Virginia Mae Brooks

Charles A. Brooks

Richard A. Brooks

Kenneth C. Brooks

Pine Street Management Corporation

Marinship Enterprises, Inc.

The Harroman Company, Inc.

The Makiki Corporation

William W. Saunders

Ira Blaustein

Wells Fargo Bank American Trust Company
Peter O. Mattei
Ben Gromet
Jim Cyrus
Richard N. Rapoport
Sidney P. Rudy
Tierra Ranch, Inc.
Contracts Discount, Inc.
John E. Fort
Julius Barr & Co.
Title Insurance and Trust Company
Sam Steinberg
Irving Sulmeyer
Holexa, S. A.
Petramonte Productions Corporation Establishment
Stonehill Family Trust
Tower Development Corporation
Merriweather Development Corporation
California Street Corporation
Palo Corporation
The Brookstone Corporation
Swiss Bank Corporation
Northwestern Savings and Loan Association
Heath Land Company
Kurt Heath
Nathan Berke
Jane Ratney

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

No. 84-_____

HARRY S. STONEHILL and
ROBERT P. BROOKS, - - - - *Petitioners,*

v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Ninth Judicial Circuit entered on December 27, 1984.

OPINIONS BELOW

The Opinion and Order of the Ninth Circuit Court of Appeals is unreported and appears as Appendix A, p. 1a. The Opinion and Order of United States District Court, dated April 12, 1984, are unreported and appear as Appendix B, p. 2a.

JURISDICTION

The decision of the Ninth Circuit was entered on December 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). 28 U.S.C. § 2101(c) provides that a petition for a writ of certiorari shall be filed within ninety days after entry of the final order of the Ninth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

Petitioners are United States citizens against whom the Government commenced actions to foreclose jeopardy income tax assessment liens in January 1965 in several United States District Courts.[1] The issue of tax liability was decided in favor of the Government in *United States* v. *Stonehill,* 420 F. Supp. 46, aff'd 702 F. 2d 1288 (9th Cir. 1983), *cert. denied,* 465 U. S. ___ (March 5, 1984).

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[1]The actions were originally filed in the Districts of Hawaii, Northern and Central California. The United States District Court, District of Oregon, the Honorable Gus J. Solomon, sitting by designation, assumed control of all cases on a consolidated basis, and decided the issues without the intervention of a jury. The action in the District of Hawaii is incomplete and was not involved in the decision of the Ninth Circuit Court of Appeals for which the Petitioners seek review.

On March 30, 1984, Petitioners filed a motion for relief from the judgment under Rule 60(b)(6), Federal Rules of Civil Procedure. The grounds for the motion were that during a post-trial hearing held on May 20, 1981, authorized by the Chief Judge of the Ninth Circuit after the appeal on the merits had been perfected, the trial court, *sua sponte,* acknowledged for the first time its "grievous error" in relying upon matters not in evidence as the basis of its finding of tax liability. Because this acknowledgment of error was made after the appeal had been perfected, the matter was not available for assignment of error on appeal to the Ninth Circuit Court of Appeals.[2]

The Rule 60(b) motion presented the District Court with these statements from the hearing on May 20, 1981:

> "The Court: It might be. I am equally surprised that for five years, nobody even called my attention to the error, the grievous error that I made on Pages 60, 61, 62 in which I discussed those various items.
>
> "We've discussed various aspects of a case. We arrived at figures. And no one ever called

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[2]The assertion that the District Court had confessed error during the May 20, 1981 hearing was argued in petitioner's prior Petition for Writ of Certiorari, No. 83-908, denied March 5, 1984. At that time the issue had not been ruled upon by the Ninth Circuit. The prior denial of certiorari does not preclude the present application for a writ, *Mercer* v. *Theriot,* 377 U. S. 152, 153-154, 84 S. Ct. 1157, 12 L. Ed. 2d 206 (1964), and does not constitute a law of the case ruling nor *res judicata* as to matters previously raised. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U. S. 363, 365, n. 1, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973).

my attention to the fact that I had no right to discuss opening net worth.

"Well, I forgot a couple of pages. Starting in from 57, 58, 59, 60 and 61, the major portion of my opinion, no one ever told me until today that all of this was irrelevant to any issue that was properly before me.

* * * *

"I'm surprised that I spent the major portion of my opinion on matters that were never admitted in evidence and nobody ever called my attention to it."

(5/20/81 RT 69, 70, 75; CR 767, Appendix C, pp. 52a-53a, 56a-57a)

The trial court nevertheless found that the equities and law were in favor of the Government and denied the Rule 60(b)(6) motion. The opinion does not contain any other specific findings but does set forth other matters. The District Court said that Petitioners' counsel ". . . 'take out selected portions from selected witnesses' "; that Petitioners' counsel did not call to the Court's attention or ". . . let me correct any error that I made";[3] and also said:

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[3]Petitioners had brought the matter of the absence in the record of pivotal evidence on several prior occasions to the attention of the trial court:

"The Court: Are you going to prove that he omitted certain items of income and seeking (sic) to get a judgment against him based upon the failure to record specific items?

[Governmental Counsel] "Mr. Biggins: No, I stand on the presumption." (5/27/75, trial RT 34).

* * *

(Continued on next page.)

> 'But I don't know whether there is *that* error, and it may very well be that other portions of the record would permit you to put it in. And if you (government counsel) think so, you can go ahead and put it in.'
> (5/20/81, RT 74; Appendix B, p. 3a; emphasis supplied.)

Twenty-six transcript lines later the trial court said:

> I'm surprised that I spent the major portion of my opinion on matters that were never admitted in evidence and nobody ever called my attention to it.
> (5/20/81 RT 75, Appendix C, pp. 56a-57a)

On appeal Petitioners contended: that the standard of review in Rule 60(b) cases was abuse of discretion;

(Continued from preceding page.)

"The Court: The Government came in and relied on the presumption for the purpose of showing fraud, as I think the Government must show. I permitted this to introduce the testimony of Mr. Ragland and also show evidence solely for the purpose of fraud. (5/28/75, trial, RT 227-278).

* * *

"The Court: And the Government elected to proceed on the basis of the presumption of validity. They were stuck with that theory. They decided they wouldn't go into the evidence." (12/20/76, post trial, RT 21).

* * *

[Petitioner's counsel] "Mr. Rand: Well, what happened to the trial? You see, Judge—maybe I'm wrong. I wish the Court would tell me. We went to trial and Mr. Biggins put in his bare assessment, and then he rested.

"The Court: Yes.

"Mr. Rand: He rested.

"The Court: Yes." (12/20/76, post trial, RT 45).

that the scope of the error acknowledged by the District Court, including the specification of pages in its published opinion, invalidated the entire section of the opinion on taxpayer liability, (420 F. Supp. at 57-61); and that lack of any evidence (as opposed to the sufficiency of evidence) to support the liability question was a violation of due process.

The Ninth Circuit affirmed the Government's Motion for Summary Affirmance, holding that no concession of error had been made by the District Court. (Appendix A, p. 1a.)

REASONS FOR GRANTING THE WRIT

The Decision Below Disregards the Plain Meaning of the Words Used by the District Court in Confessing Error and Thereby Improperly Sanctions the Enforceability of a Clearly Irregular, if not Void, Judgment and Thus Violates the Due Process Clause of the Fifth Amendment.

The holding by the Ninth Circuit that the District Court had not conceded error surely cannot mean that the trial court did not make the statements upon which the Rule 60(b)(6) motion was based. The determination by the appellate court surely cannot mean that the statements of the District Court are to be interpreted in a manner inconsisent with the plain meanings of the words used, especially since the trial court, given the opportunity to do so in its written opinion denying the Rule 60(b)(6) motion, did not qualify or explain its statements acknowledging its "grievous error".

Petitioners do no seek to relitigate those issues previously decided. However, a brief analysis of the

record as it existed at the May 20, 1981 hearing is material to the standards which Petitioners contend are applicable and were violated.

The first standard invoked is the principle that a judgment must be supported by evidence. In *United States ex rel. Collins* v. *Ashe,* 176 F. 2d 606, 607 (3rd Cir. 1949), the Court said:

> It is so well established as not to require discussion, however, that a district court of the United States must base its decision on evidence actually in the record of the case and that an appellate tribunal cannot base an adjudication on items of evidence informally offered to the trial court and, though apparently read by it, not made part of the record.

It was admitted by the Government that the net worth calculations were attached to copies of a reply brief. The trial court asked if ". . . attaching the net worth figure to the brief [was] the equivalent of having it admitted into evidence?" (Appendix C, p. 26a) The Ninth Circuit noticed this irregularity in *United States* v. *Stonehill,* 702 F. 2d 1283, 1295 n.10, (1983): "The status of the net worth calculations was somewhat unclear. The judge based portions of his opinion upon them. 420 F. Supp. at 59-61." These page numbers fall within those specified by the District Court in its acknowledgment of error made during the May 20, 1981 hearing. (Appendix C, p. 53a) Further, the issue clearly had been brought timely to the attention of the trial court (Appendix D, pp. 67a-68a)

In the interpretation of the matters assigned as acknowledgments of error the courts below surely were aware of the record circumstances. Petitioners did, in fact, select only certain matters from the record as the basis of their claim for relief from judgment. The matters relied upon were those unqualified statements of the trial court itself pertaining to its error. However, the passages selected were accurately asserted. No portion of the transcript establishes that the District Court did not make the statements attributed to it or that the Court did not mean what it said. The last statement made by the trial court on the matter was its specific acknowledgment that it had relied on matters not in evidence. (Appendix C, pp. 56a-57a)

It is significant that the Court of Appeals, in the face of the clear language by the District Court acknowledging error, concluded that the trial court had not conceded error, without citing a single statement of the District Court in support of its determination. Petitioners contend that the finding of no concession of error by the Ninth Circuit Court of Appeals was an abuse of discretion.

The second standard invoked is set out in *Langes* v. *Green,* 282 U. S. 531, 541, 51 S. Ct. 243, 247, 75 L. Ed. 520 (1931):

> When invoked as a guide to judicial action, [judicial discretion] means a sound discretion, that is to say, a discretion not exercised arbitrarily or wilfully, but with due regard to what is right and equitable under the circumstances and the law, and directed by reason and conscience to a just result.

The validity of a judgment depends upon its being sustained by evidence. *United Transportation Union* v. *State Bar of Michigan,* 401 U. S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971). Therefore, for an appellate court to sanction a judgment upon a record containing its own acknowledgment of uncertainty as to the evidentiary base for a critical element of liability (702 F. 2d at 1295, n. 10), violates the principle that "[a] decree must relate specifically and exclusively to the pleadings and proof" 401 U. S. at 581. When squarely faced with judicial statements by the trier of fact that it relied on matters not in evidence *on the identical issue* about which the Court of Appeals had expressed concern, the failure by the Court of Appeals to correct such plain error constitutes an abuse of discretion. See, *United States ex rel. Collins, supra,* 176 F. 2d at 607-608. In *Good Luck Nursing Home, Inc.* v. *Harris,* 636 F. 2d 572 (D.C. Cir. 1980), Rule 60(b) relief was granted by the District Court upon its finding that the prior judgment was based "on a 'fundamental misconception of the facts'." 636 F. 2d at 579. The Court of Appeals affirmed, noting that the judgment had been shown to be "manifestly unjust." *Id.* at 557. In *Gray* v. *Estelle,* 574 F. 2d 209, 215 (5th Cir. 1978), Rule 60(b)(6) was employed to prevent "a gross miscarriage of justice."

The cited passages from the May 20, 1981 hearing emphasize that the District Court had a "fundamental misconception of the facts" which were in evidence when it wrote its opinion finding liability based on

matters not in evidence. The consequence is a "manifest injustice." The matter thus is one of constitutional significance. In *Thompson* v. *City of Louisville,* 363 U. S. 199, 204, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), a misdemeanor criminal case, this Court held that a judgment without supporting evidence violated the Due Process Clause of the Fifth Amendment. In *Thompson,* this Court on review determined that there was no evidence of record to support the judgment. In the instant case the trial court has acknowledged that there was no evidence of record to support its judgment. Therefore, the violation of the Due Process Clause presented in this case is more apparent than the violation found in *Thompson.*

CONCLUSION

Petitioners pray that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

H. DAVID HERMANSDORFER
Counsel of Record for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

Nos. CA 80-4590, 80-4598, 80-4599 and 80-6062

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

HARRY S. STONEHILL, et al. - - *Defendants-Appellants*

OPINION AND ORDER — Decided December 27, 1984

BEFORE: CANBY, NORRIS and REINHARDT, Circuit Judges:

Appellees move for summary affirmance of the district court's order denying appellants' motion for relief from judgment under Fed. R. Civ. P. 60(b).

On appeal, appellants contend that the determination of tax liability previously affirmed by this court was based upon findings and conclusions which the district court subsequently conceded to be in error. Appellants base these contentions on statements made by the district court during a hearing held pursuant to this court's April 1, 1981 order remanding the case to the district court to resolve appellants' motion to strike parts of the record on appeal.

The district court denied appellants' Rule 60(b) motion noting that appellants took the court's statements out of context. Our review of the transcript provided by appellee confirms that no concession of error as alleged by appellants was made by the district court. No other substantial issue is presented by the appeal. Accordingly, appellee's motion for summary affirmance is granted. *See United States* v. *Hooton*, 693 F. 2d 857 (9th Cir. 1982).

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CA Nos. 80-4590, 80-4598, 80-4599, 80-6062
DC Nos. CV 65-127-50
43244
65-2345
65-2348

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

HARRY S. STONEHILL,
ROBERT P. BROOKS, et al. - - *Defendants-Appellants*

OPINION—Decided April 12, 1984

SOLOMON, Judge:

Harry S. Stonehill and Robert P. Brooks (taxpayers) seek relief from the judgments entered against them in this and several other district courts, which judgments were affirmed on appeal. Taxpayers assert that during the hearing on the contents of a transcript on appeal, I conceded that I had erred in basing my decision on erroneous assumptions.

I have examined the full transcript of the proceedings dated May 20, 1981, and as I pointed out at that time, the counsel for the taxpayers in their presentation "take out selected portions from selected witnesses." (pg. 75).

I also stated that "I can't understand how I so grievously misunderstood the taxpayers' case. And I can't

blame them for not calling it to my attention because they're out to win the case and not to let me correct any error that I made.

"But I don't know whether there is that error, and it may very well be that other portions of the record would permit you to put it in. And if you (government counsel) think so, you can go ahead and put it in."

The taxpayers' contention that the government was not entitled to the presumption of correctness for the assessments because they lacked factual foundations was fully argued in the Court of Appeals and was considered and rejected by that court.

I have reviewed the full transcript of the May 20, 1981 proceedings, my opinion dated July 23, 1976 and reported at 420 F. Supp. 46, the opinion of the Court of Appeals reported at 702 F. 2d 1288, and other pertinent documents. I find that the equities and the law are with the government and against the taxpayers.

The motion of Harry S. Stonehill and Robert P. Brooks for relief from the judgments is therefore denied.

DATED this 12th day of April, 1984.

/s/ Gus J. Solomon
Judge

APPENDIX B (Continued)

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CA Nos. 80-4590, 80-4598, 80-4599, 80-6062
DC Nos. CV 65-127-50
43244
65-2345
65-2348

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

HARRY S. STONEHILL,
ROBERT P. BROOKS, et al. - - *Defendants-Appellants*

ORDER—Decided April 12, 1984

IT IS ORDERED that the motion of Harry S. Stonehill and Robert P. Brooks for relief from judgments is denied.

IT IS FURTHER ORDERED that counsel for the government and counsel for appellants Ben Gromet, William W. Saunders, Tower Development Corporation, and Meriwether Development Corporation appear on Friday, May 4, 1984 at 9:30 a.m. in Courtroom No. 20 of the United States Courthouse, 312 N. Spring Street, Los Angeles, California, for a status conference to determine the future course of proceedings relative to the claimed interest of Ben Gromet, William W. Saunders, Tower Development Corporation, and Meriwether Development Corporation in certain properties involved in these actions.

DATED this 12th day of April, 1984.

/s/ Gus J. Solomon
Judge

APPENDIX C

ENTIRE TRANSCRIPT OF MAY 20, 1981 HEARING

IN THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 64-127-GS

UNITED STATES OF AMERICA, - - - *Plaintiff,*

v.

HARRY S. STONEHILL, et al., - - - *Defendants.*

May 20, 1981—Portland, Oregon

TRANSCRIPT OF CHAMBERS CONFERENCE

BEFORE:

The Honorable Gus J. Solomon, Senior Judge, United States District Court.

APPEARANCES:

Mr. Arthur L. Biggins, Attorney, Tax Division, Department of Justice, appearing in behalf of the Government;

Messrs. James R. Moore, Ridgway K. Foley, Jr., and James Alford, counsel for the Defendants.

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(Wednesday, May 20, 1981, the following proceedings were held in chambers:)

The Court: All right. Go ahead.

Mr. Moore: Well, what we've done, Judge, on the appeal is that we tried to take a 14-year record and limit the issues as severely as we can in the best interests of our client with eliminating what we consider to be the primary issue on appeal.

And as we've stated in our issues on appeal, the primary issue is whether or not the Government has the right to rely on the presumption, or more appropriately, whether the presumption of correctness existed in their favor at the end of the trial in light of the substantial adjustments that had to be made in the amount of tax shown on the original jeopardy assessment.

And while there are collateral issues, and I call them arguendo issues, relating to the wives property and that sort of thing, the attorneys' lien and those other things that the Court considered.

On the merits of the case, the primary issue on appeal is was there such a presumption of correctness when we started the trial, having already had the issue of community property determined, and if

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there was still that presumption at that time, did it exist at the end of the trial after the concessions were made on the corrections and the adjustments and so fourth?

We have specifically in our notice to the Ninth Circuit said that we do not appeal and we do not intend to appeal three issues that were raised below. One is fraud, because it will rise and fall with the basic tax.

Two, the motion or renewal of the motion to suppress that was decided by the Ninth Circuit the first time the case went up; and three, the summary judgment motion, sometimes referred to as the Constitutional motion or the integrity of the audit motion, and at other times, fair trial motion, summary judgment motion.

And so those three areas we specifically told the Court of Appeals in our papers that we're not appealing. And the reason for that from the standpoint of us as lawyers is to try and make the record manageable, to try and make the issue clear cut, and to get a legal determination as opposed to a factual determination on what we consider to be the primary issue of the trial.

The Court: Well, fine, You know, I am very

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much in favor of cutting down the record. We still have file cabinets, many of them, filled with documents here. And that is nowhere near the documents that were originally gathered.

As you know, there were 35 truckloads of documents taken by the Philippine government. And when we tried a portion of the case in Portland, there was about a carload of documents in this courtroom, and I tried to get rid of most of them. And your statement comports with what I understood this appeal was all about.

But I don't think you told that to Mr. Foley over here because his statement of issues to be presented on appeal is not very clear and goes far beyond what you have said.

But now it may be that I'm giving it too broad a construction. So instead of relying on what you say, because I know you have colleagues and associates, Jim, I want to find out precisely what you're contending over here, and then it will be much easier for me to determine what, if anything, has to be put in the record.

What do you think of that, Art?

Mr. Biggins: That sounds good to me.

The Court: All right. Before you say anything

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then, and before you continue very much, let's find out what you had in mind. Who drafted that thing?

Mr. Moore: I did.

Mr. Foley: Jim Moore drafted it, Your Honor. I signed it.

The Court: You're the culprit.

Mr. Moore: His outline was mine, but the concept was mine.

The Court: All right.

Mr. Moore: And if you'll turn to our statement to be presented on appeal, which we attached to our memo —

The Court: All right. I have it in front of me, and I studied it.

Mr. Moore: Okay. If you turn to Page 2.

The Court: Page 2. Yes.

Mr. Moore: That's where they start.

The Court: I'm going to ask you the questions.

Mr. Moore: All right.

The Court: Do all of you have Page 2?

Mr. Alford: Yes, Your Honor.

The Court: Yes. Subdivision 1(a) in paren.

Mr. Moore: Uh-huh.

The Court: "The certificate of jeopardy assessment was conceded by the Government in pretrial

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proceedings to have been substantially erroneous."

Mr. Moore: Well, —

The Court: Tell me in what way they conceded it was erroneous.

Mr. Moore: Okay. I think that there are three items that everyone agrees upon.

The first is the community property issue in which —

The Court: Yes. Well, you don't have to go ahead. Just tell me, the community property, the opening net worth —

Mr. Moore: No, no, We never got a net worth —

The Court: All right.

Mr. Moore: — in the record, Judge. It's three items. It's community property, it's amortization of the barter permit, —

The Court: Yes.

Mr. Moore: —and it's the blue book deductions. Those are the three concessions made by the Government that acquired adjustments —

The Court: Wait a minute.

Mr. Moore: — that required adjustments of the tax as shown on the jeopardy assessment.

The Court: The blue book, what is that?

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Mr. Moore: Those are the amounts that were — well, we don't know because the admonition from the Government in effect was, "Don't put it in evidence, and we will concede the deductibility of the total." And the total was some $40,000, as a recall. But that was one of the three concessions made by the Government that had not been taken into account in the original jeopardy assessment of tax.

The Court: Well, insofar as the community property is concerned, I don't think you need very much of a record. I think we all have it. In my opinion, I set forth what the facts were. Are you asking for anything as far as the community property is concerned?

Mr. Biggins: I believe I stated my concession in a letter to the Court accompanying my brief on community property. You agreed that it could be —

Mr. Moore: Well, I think the easiest — excuse me. I think the easiest place for the Court on references is in the computations, the adjustments that the Government —

The Court: Well, there is no question about that. And then there's the 10 millions pesos —

Mr. Moore: For the barter permit, yes.

The Court: — for the barter permit. And I

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thought you made a statement that the opening net worth was grossly underestimated —

Mr. Moore: No.

The Court: — and substantial cash on hand.

Mr. Moore: There is no net worth statement in the evidence, and we made no reference to that.

The only thing that we —

The Court: Well, maybe this is one of your arguments. I made some notes. "The taxpayers refused to testify either in person or by deposition about 10 million pesos. Three million in U.S. money had already been paid out as gifts or bribes to Philippine officials. The taxpayers' records do not accurately reflect their financial operations which were widespread and scattered."

I'm analyzing my opinion. That's right. Now, I agree that the 10 million pesos was paid for the permit.

Mr. Moore: Yes, Your Honor.

The Court: And I found it was a business investment even though it may have been illegal and immoral. But it wasn't reported in the books of the corporation, and it was reasonable to conclude that it was a personal expenditure.

"On the basis of the direction of the Executive

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Branch of the United States Government for reasons of international policy, the Government conceded and I approved the granting of this payment as a proper item of business expenditure."

Mr. Moore: Yes, Your Honor.

The Court: All right. On that value, it's undisputed that the Government, like the taxpayers, used 3.54 pesos to the dollar, the black market figure, and they used the same conversion rate both at the beginning and at the end of the tax period.

Mr. Moore: Yeah, there is no — there is no dispute on the appropriate amount to be amortized.

But our point is not that, Judge. Our point is simply that that is not an item that was taken into consideration in the jeopardy assessment tax figure upon which the Government relies —

The Court: Oh, yes.

Mr. Moore: — for corrections.

The Court: I know. That's fine. This is a legal question.

Mr. Moore: It's purely legal.

The Court: Now, what about that $40,000? I didn't refer to that at all, I don't think.

Mr. Biggins: By agreement with the Court and counsel, it was conceded by the Government on the

condition that it not be referred to by counsel again or raised on appeal.

Mr. Moore: The —

Mr. Biggins: So raising it on appeal now is contrary to the oral understanding as reflected by the transcript of the Court.

Mr. Moore: We have not even mentioned it. The Judge asked me what the items were. That adjustment was shown in your —

Mr. Biggins: It can't be used.

Mr. Moore: In your schedule. All I'm — the argument I'm using, Arthur, is that there was a 60 per cent plus error in the amount of tax shown on the jeopardy assessment which the Government relies on for correctness.

The Court: All right. Wait a minute. I think that under the circumstances, you can have that portion of the transcript put in evidence showing that there is a violation of the agreement. All right.

Mr. Biggins: But it involves, as the Court recalls, in the sealed envelope is the name of some high officials in the Philippines.

The Court: We're not talking about that.

Mr. Biggins: Yeah, the blue book has a whole list.

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The Court: The blue book too?

Mr. Biggins: Yes. That's a blue book item.

Mr. Moore: I have never seen the blue book. I have only seen the Government computations of tax —

The Court: But it only reads $40,000.

Mr. Biggins: My recollection is it's a much higher amount.

Mr. Moore: I don't recollect. I thought it was a higher amount, Judge. Do you recall, Jim?

Mr. Alford: I believe it's more than $40,000.

Mr. Moore: I see. But whatever it is. I don't know what it is. I've never seen the blue book, Judge. All I know is that in the Government's own computation, in trying to adjust to a correct tax at the end of the trial, they conceded an adjustment for those deductions.

Mr. Biggins: This was referred to during trial.

Mr. Moore: Pardon?

Mr. Biggins: This was referred to during trial.

Mr. Moore: But the notation, as I recall, on the Government schedule was the so-called blue book deduction. And there were three items —

The Court: Well, I think that the discussion

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should go into the record and the envelope remain sealed, but go up on appeal.

Mr. Biggins: I understand.

Mr. Moore: I don't — I don't think there's any argument. We have designated that portion of the transcript already. It is not a part that we're disputing here, Judge.

The Court: Oh, okay. Now, I don't think that that calls for anything other than a little portion of this transcript of the meeting. And so that is pretty clear.

Mr. Moore: We have —

The Court: Are you asking for anything more on Item 1(a)?

Mr. Biggins: I can think of nothing, Your Honor.

The Court: All right.

Mr. Biggins: The barter agreement wasn't a concession. It was a determination of the Court —

Mr. Moore: Yes.

Mr. Biggins: — as part of the contention of the taxpayers' challenge of the opening net worth.

The Court: But he is not denying that. He just says that where the wives got a community property interest, where the barter agreement, 10 million pesos,

was paid, and with 40,000 or 80,000 —

Mr. Moore: Whatever.

The Court: — on the blue book, it destroys the integrity of the jeopardy assessment.

Mr. Biggins: Okay

The Court: That's a question of law —

Mr. Biggins: All right.

The Court: — based upon facts of which there is no dispute.

Mr. Biggins: Yes.

The Court: All right. So we don't need any transcript on that.

All right. Now, B. "The Government fails or refuses to put in evidence any deficiency notice in respect to the tax to which the jeopardy assessment relates or any other amended notice required by IRC or to amend the jeopardy assessment to correct substantial errors pursuant to certain sections."

Mr. Moore: What we're saying there, Judge, is that there are two provisions of the Internal Revenue Code which would have permitted the Government to either amend the notice of a deficiency or amend the jeopardy assessment to a correct figure in light of community property, et cetera, et cetera. And they did not do so.

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And we think the legal effect of that again is to call into question the correctness of the reliance upon the presumption of the jeopardy assessment.

The Court: Then you are not contending in this subsection that the Government may not maintain this action by reason of the fact that after the jeopardy assessment was made, they did not serve another document?

Mr. Moore: Your Honor, and for the record now, and I think Mr. Biggins' concerns in that area are imagined, we do — we admit, we agree that the notice of jeopardy assessment was served on the taxpayer.

The Court: All right.

Mr. Moore: We don't argue about that, and that's never been a point.

The point that we make later on, and it has nothing to do with this subparagraph, is that it had a computation of tax. It had information that would have been helpful to the Court, and — the Court of Appeals, and it was not introduced into evdience; and it never was introduced in evidence.

The Court: Okay.

Mr. Moore: But this —

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The Court: We're coming to that later.

Mr. Moore: Yeah. This paragraph simply relates to what the Government could or should have done with reference to amendment once it found that the errors existed.

The Court: All right. Fine. Does that clarify it?

Mr. Biggins: Well, this is going to get to the nitty-gritty of our problem here. We can address it now or we can address it later.

Mr. Moore: Well, I read your brief, Arthur, and I've made my stipulation for the record. We do not contend that the Government failed to mail the notice of deficiency to the taxpayers. We don't argue that.

The Court: All right.

Mr. Moore: We don't contend you didn't do it.

The Court: This subsection merely relates to the fact that after you concluded that you should have given him credit for that 10 million pesos, and after it was concluded that the wives were entitled to community property, you should have amended your jeopardy assessment. That was about 12 or 14 years after the jeopardy assessment was made. That's your point?

Mr. Moore: Yes. But —

Mr. Biggins: May I inquire?

Mr. Moore: Yes.

Mr. Biggins: Attached to the deficiency notice was the net worth determination.

Mr. Moore: Yes.

Mr. Biggins: There's no dispute on that either?

Mr. Moore: What — whatever was attached there was attached there. And we don't deny that whatever attachments were made were mailed to the taxpayer.

The problem is, Arthur, that we're looking at a record on appeal, and we're arguing about a record on appeal. But noplace in that record on appeal, whether you've asked for it or we've asked for it, did that notice or that net worth computation go into evidence. And that's a whole different animal.

Mr. Biggins: May I clarify our position?

The Court: Yes. Go ahead.

Mr. Biggins: Now, before coming to this point, going back to mine, I made a concession on the record concerning community property. That was not a trial. It was a pretrial proceeding.

Mr. Moore: Yes.

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Mr. Biggins: And in that pretrial proceeding, not introduced in evidence by your case, is referred to as part of the record on appeal.

The next item —

Mr. Alford: It was not. It was a bifurcated trial on a community property issue, Your Honor, under Rule 42 of the Federal Rules of Civil Procedure.

The Court: I had that trial, and I heard that.

Mr. Alford: That's correct. Testimony was taken and exhibits were introduced.

The Court: And I ruled that the wives were entitled to community property.

Mr. Biggins: Perhaps he misunderstands what I'm saying. Included as part of the transcripts that you designated on appeal was not only that trial but a pretrial proceeding where I made a concession concerning this.

The Court: Well, what difference does that make?

Mr. Moore: I thought we're talking about what we haven't designated.

Mr. Biggins: All right. Now, we're coming to a point where the taxpayers conceded something.

Now, first, my position is that all we have to

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do is put in a certificate of assessment, as the Court held on Page 55.

After that then arises the question, "Need we also put in the notice of deficiency and the net worth statement?"

Now, I take two positions on that. First — and it's the second position that will create the problem.

The first is I need not as a matter of law. And that's our position on appeal.

The Court: All right.

Mr. Biggins: The second is, even if we need it, it was already admitted by counsel before we came to trial that they received it. And those admissions are part of the references that I've included in my transcript.

The Court: All right.

Mr. Biggins: Now, part of my references to the prior record were in the brief that I included in the appendix to my memorandum here where I invited the Court's attention to the concessions by counsel at the very first proceeding before Westover that they got the notice and they got the net worth.

In fact, in a brief filed at that time by taxpayer's counsel, they Xeroxed a copy of the net worth

determination as part of their brief.

Mr. Moore: I agree with that, Arthur. But you're missing the point.

We're not making the contention on appeal, and we don't intend to make the contention on appeal, that you have not mailed that to taxpayer, that counsel for the taxpayer obviously had it available to them.

The point we're making on the appeal is that it was not introduced into evidence by the Government, and as a result, the Defendants did not come forward and attempt to rebut and put in counter-evidence and so forth.

But what we're saying is, again, there's an absolute total absence in the record of that net worth and notice of deficiency; and that's the fact.

Now, the fact that counsel had access to it, both counsel, and the fact that there was extensive discovery prior to trial which didn't end up in trial exhibits is immaterial to the appeal. We're taking the legal position, not the

factual position but the legal position, that the jeopardy assessment is not entitled to the presumption of correctness because, and then we've tried to set forth the reasons. And they're cumulative reasons. Each one may not stand on its own feet. We've added the conjunctive after each

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one. But that is a legal position we're taking.

And we agree with you that the counsel and the taxpayers have the notice of assessment. We don't deny that, and we don't —

Mr. Biggins: That is the first statement.

Mr. Moore: Well, whatever is attached to the notice of deficiency, Arthur, the counsel and taxpayers got them.

The Court: But they say that you failed to offer them in evidence.

Mr. Biggins.: Well, here is the Court's finding on Page 55, if it comes in question, how do I support it. 55, Paragraph 12. Let me read it and then comment.

The Court: All right.

Mr. Biggins: The Court's holding: "Here, there was actual notice. The taxpayer acknowledged at hearings and in their briefs that they received the deficiency notices. In 1965, the petitioners in their petitions to the Tax Court acknowledged receipt of the notices of deficiency." End of quotation.

I have a different understanding of the word "record" than is being urged by Mr. Moore here. I think part of the record before this Court included the prior transcripts and prior admissions. And those

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are what I invited to the Court's attention in my brief upon which I think this finding was held.

Be that as it may —

Mr. Moore: But the simple fact is that we are not appealing the Court's finding. We are not appealing that

finding of Judge Solomon. That's true. That's a fact. And we've not designated that as error. We don't believe it to be error.

Mr. Biggins: Well, let me make one —

The Court: Wait a minute. Maybe we had better take up C in connection with B.

Mr. Moore: Well, —

The Court: "The record in the case is devoid of any facts shown on the computation from which the tax liability as shown on the jeopardy assessment or any other tax asserted liability can be verified or determined."

Mr. Moore: Now, here we're at the final hearings, as the Court will recall, when — and this is not related to B. This is an entirely different idea.

What happened was we got down to the end of the trial. And what we had in the record was a jeopardy assessment of tax only, with no income, no expense, no record to show how that tax was determined.

We then had conceded adjustments that had to be

made to that based upon community property, amortization of the barter permit, and the blue book deductions.

We contended at that hearing, and we've designated that entire transcript, that it is not mathematically possible to go from that tax figure, put in these income and expense deductions and reach a tax judgment which the Court reached in entering its judgment. And we've made that contention clear through, and we still believe that that is correct. And that again is a matter of legal argument, principally, because we think in failing to provide the Court with the method upon which the tax was derived, the Government has not enlightened the Court sufficiently for the Court to reach a tax amount after the adjustments. And that's pure and simple what that says.

The Court: I thought that the figures I used were figures that had been arrived at by a consent. You may not have participated in those discussions.

Mr. Moore: Yes, I did, Judge. I—

The Court: But I mean, didn't the discussions take place in Washington, D.C. also?

Mr. Biggins: Part of them.

The Court: Yes.

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Mr. Biggins: But the final computations that were made were here. Mr. Moore participated very actively in it.

Mr. Moore: Yes.

Mr. Biggins: And the final draft, the final go-over in fact occurred in your office.

Mr. Moore: That's correct.

Mr. Biggins: From there back here.

Mr. Moore: But no, we didn't — we simply acknowledged that the Government — this was the Government's computation, and that we reviewed it, and the Court found that tax to be there. We never agreed or conceded, Judge, that that was a correct or proper computation of tax.

And we couldn't do that because we had contended in the brief and in argument to the Court that for various reasons, and I wrote the Court about a five-page letter brief on some of the reasons why. You can't go from A to B using a bare tax figure.

And we still contend that, and will contend that on appeal.

The Court: Well, do you need any record in view of Jim's statement?

Mr. Moore: We've designated that entire record on those post trial items.

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The Court: Okay.

Mr. Moore: And that's not part.

Mr. Biggins: Nearly.

Mr. Moore: What?

Mr. Biggins: Nearly.

Mr. Moore: Oh, I thought, we designated everything, didn't we, Jim?

Mr. Alford: I believe we did.

Mr. Moore: On those hearings on the computation tax.

Mr. Biggins: Then you'll have no quarrel.

The Court: Pardon

Mr. Biggins: Then you'll have no quarrel with the suggestion that I have. May I state my position, which again is in two parts, Your Honor?

The Court: All right.

Mr. Biggins: First, there being no dispute that they got the net worth, our primary position on the computation was we didn't need the net worth to make the computation because there was no dispute.

Mr. Moore: No dispute as to what?

Mr. Biggins: No dispute that you got the net worth statement and we can proceed with the computations, just like we would on lost carry-back or other —

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The Court: Now, was the net worth statement used as a basis for the computations that you made near the end of the trial?

Mr. Biggins: At first it was but subsequently it wasn't. We went through more than a year of dispute on this, Your Honor.

May I briefly relate the history?

At first, we made the computations directly to the net worth in accordance with our interpretation of the Court's holding.

Taxpayers' counsel — this I believe was before Mr. Moore got into it.

Mr. Moore: No. I was there.

Mr. Biggins: In Washington, your appearance doesn't appear.

Mr. Moore: Well, I remember Mr. Rand and myself pointing out to the Court the particular item on the computation that referenced the notice of deficiency and saying that is not in the record and the Judge asking, "Is that true? Is that not a part of the record?" And —

Mr. Biggins: That's the San Jose — I mean the Palm Springs.

Mr. Moore: And you said, "That's correct, Judge. That's not in the record", or words to that

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effect.

And then the Court addressing you, Mr. Biggins, and saying, "Go back and make a computation that relies solely on the record."

And what the Government did then was to try to take the tax figure and back into a new tax figure and do a computation on that basis. That's what they did. That on its face purports to be simply from the record. We believe it's incorrect and can't be justified.

But that's a legal issue that we'll argue.

The Court: All right.

Mr. Biggins: May I finish my response —

Mr. Moore: I'm sorry to interrupt.

Mr. Biggins: — to the Court's question?

To recap, we did it both ways. The first way I did it was by making adjustments, as I understood the Court's opinion, to the net worth schedule, which I believe and still believe we had a legal right to do.

The question was then raised, "Well, you didn't formally put that in evidence." And I agree to that. There's no dispute in fact that it was not introduced.

And then knowing as a matter of math that I can make the same computation backwards and forwards and

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get the same answer, I said, "All right. We'll do it backwards by mathematical computation", and we did.

Now, my recollection is at the trial hearing on that, because they instructed the agent to do it both ways, by net worth and see what his answer was and backwards mathematically to see what his answer was, and they were the same.

And I informed — and they had to be the same. I believe Mr. Rand on a transcript conceded —

Mr. Moore: I'm reading Mr. Rand on the transcript, and I don't agree with that.

Mr. Biggins: Well, I don't recall what his answer was. But —

The Court: What does he say?

Mr. Moore: Well, it starts out, Your Honor, with the Court — Mr. Biggins stating, "We can make the computation as the Court desires. We think we have made that. The Court: I don't think you can make it on anything that is not in evidence."

And then the Court said, "Well, I think, Mr. Biggins, Mr. Rand is correct in this statement, that we proceed from the assessment made by the Commissioner on January 18, 1965."

And then the Court said, "After giving credit for the $3 million or 10 million pesos, that's to be

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deducted from this, and it would be a deduction in the tax and interest on the penalty."

(Counsel continues reading from transcript.)

And then the Court again: "Now, I also throw the problem out here, and I see it, of the presumption of correctness on Stonehill and Brooks. But we don't have in this assessment of deficiency the figures upon which this assessment was determined. That's the 13 million plus for Stonehill.

Now, we're going to have to give them credit for 10 million pesos.

Mr. Biggins: Yes.

The Court: Both of them.

Mr. Biggins: Allocate the 10 million to both of them, yes.

The Court: That's right."

(Counsel continues reading from transcript)

"Therefore, the figures that you are ultimately coming up with are really different than the figures which you originally started with.

Mr. Biggins: Yes, sir."

(Counsel continues reading from transcript)

Mr. Moore: You see, the problem we're getting into is we don't have a net worth statement, Judge, and we have to make the adjustment. What finally —

I won't —

Mr. Biggins: That was the Palm Springs hearing was it not?

Mr. Moore: Yes.

Mr. Biggins: The statement I was referring to was in the Portland hearings subsequent to that.

Mr. Moore: Well, what finally happened, Judge, and it's purely — again, I don't think it has anything to do with the record that we're supposed to be arguing today, is that the Government made a computation backwards from the tax and attempted to verify that against the net

worth computation previously made, felt comfortable with that and submitted that as a figure.

But there is nowhere in the transcripts that I have seen, Mr. Biggins, that we conceded that was a proper and correct way to make the tax determination.

But we have designated the entire record of the hearing on the tax computation. So we haven't left anything out with reference to that.

It's just that we take the legal position —

The Court: Where is the original net worth statement that they conceded that they received? And why wasn't it put in?

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Mr. Biggins: Well, it was —

The Court: It was?

Mr. Biggins: No, it was to save trial time. When we were to — I referred I believed to that in our brief, Your Honor. The reason I did it was to go on the presumption that if you put it in, the Court suggested that we had to prove every item.

I think it's in, which I would address first.

The Court: You think what's in?

Mr. Biggins: The net worth statements are in. I'm not sure how they're in. The Court —

Mr. Moore: You just said a minute ago you agreed they weren't in.

Mr. Biggins: Well, I didn't offer them as an exhibit. But may I finish without interruption now, Mr. Moore?

The Court: Go ahead. Let's be friendly.

Mr. Biggins: On Page 55, the last sentence, they agreed that the Court's holding —

The Court: Where are you reading from?

Mr. Biggins: Reading from here. (Indicating.)

The Court: 55. All right. I have it.

Mr. Biggins: In 1965, the taxpayers in their petitions to the Tax Court acknowledged receipt of the

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notice of deficiency.

The Court: Yes.

Mr. Biggins: Now, the taxpayers' petitions to the Tax Court were not marked or offered by either party as exhibit at trial. But they did come to the Court's attention in two different ways: One by the Government and one by the taxpayer.

In my reply brief, I attached certified copies of the petitions, in my reply brief. So the Court may have referred to them there in some of the specific figures that it mentions later in its opinion.

Also, at the hearing —

The Court: Well, are you contending that attaching the net worth figure to the brief is the equivalent of having admitted it in evidence?

Mr. Biggins: Well, coming to the second point, I thought it was based on the taxpayers' concession. I think the Court could have taken judicial notice at that time. Whether it did or not I don't know.

But on Page 72 of my brief, —

The Court: Yes.

Mr. Biggins: — there's the March 30th, 1976 hearing. And there is a very brief statement at the bottom of Page 72, top of Page 73, Mr. Rand saying he

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brought two extra copies of the exhibits. What he brought at that hearing, and this was a hearing on oral argument after the briefs were filed, what he brought with him were notices of deficiency and the net worth statements.

Now, he talks here about having them in his hand and authentic copies. I checked the Court's records yesterday.

My recollection was that Mr. Rand in his oral argument handed them to the Court.

I confirmed yesterday that he undoubtedly did, because those documents are part of the record that the Clerk has in the court. And they include the notices and the net worth determinations.

Now, from that, we have no difficulty. From the documents the taxpayers' counsel argued concerning and handed to the Court, we can make specific tax computations.

Now, I think we need not. As I assured the Court before, we can make the computations backwards but come to the same thing. But are they part of the court record as I understand it? Yes, they are. Taxpayers' counsel gave them to the Court, and the Court refers to them in its opinion.

The Court: Well, there is the technical question of whether I admitted them in evidence. I

thought they were admitted, but I don't know. But the record would show it.

Mr. Moore: Judge, I — I'm terribly disappointed, Arthur, in what you said. I tried to approach this appeal as objectively as I can and not get into the kind of thing that I read in so much of the transcript that occurred.

But let me quote to you, Mr. Biggins, and Judge, on October 20, 1977:

"Mr. Biggins: We did take the assessment. I believe what Mr. Rand is referring to is we did not introduce as evidence the net worth schedule. We did not do that."

On —

The Court: What day are you talking about?

Mr. Moore: I've got a few more quotes.

"The Court: Is the Government still interested in establishing a net worth, an opening net worth on Stonehill and Brooks?

"Mr. Biggins: My approach to the trial is to avoid a lengthy group is not to use the net worth."

Mr. Biggins again quoted on April 10, 1975:

"I am not going to prove the entire net worth. We have been through that."

Again, Mr. Biggins in May of '75:

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"Thank you, Your Honor. On the case in chief, we will go to the presumption because of the enormous quantity of boxes in those to proceed now on the net worth method would be a trial of two or three months. I do have the evidence."

The record — it's over and over again. They are not relying on the net worth.

The Court: All right. What about that?

Mr. Moore: They are relying on the presumption of correctness. They are not going to introduce it in evidence.

At one time, it was offered and withdrawn. Judge, the record is the record. And what Mr. Biggins says now is entirely different than what Mr. Biggins said at the trial. And the reasons why the Government did not put in the net worth are arguable. But we're trying to erase that from the trial — from the appeal issues. It's just —

The Court: All right. Arthur, Jim doesn't deny that they received a copy of the jeopardy assessment. Ahe you contending that the failure to introduce the jeopardy assessment in evidence is fatal to the Government's case?

Mr. Moore: No, Your Honor. I don't think that in and of itself — it may or may not be.

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Mr. Biggins: May I interject a matter of semantics, Jim?

You said the notice of jeopardy assessment. I think you meant notice of deficiency.

Mr. Moore: Oh. The notice of jeopardy assessment was introduced in evidence. The notice of assessment was introduced. The notice of deficiency was not.

The Court: Oh, all right.

Mr. Moore: And the notice of deficiency is the one that had calculations on net income or expense or net worth or whatever was attached to it.

The Court: And you're contending that that's fatal?

Mr. Moore: I'm contending that in the conjunctive, and I think I can do that, that that is one of the items to take into consideration as to whether that jeopardy assessment is entitled to the presumption of correctness, Judge.

Again, we're just back to the presumption of correctness. And that's the reason that we have these subparagraphs. They're not separate issues. They're simply matters for the Court to decide as to whether or not that bare tax assessment is entitled to the presumption of correctness.

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And there is — it is a fact that the net worth computation and the notice of deficiency were not introduced in the trial of the case. And it's affirmed 20 times in the transcript, by the Court, by Mr. Biggins, and by Mr. Rand and others.

(Pause as Court examines document.)

The Court: Well, on Page 55, Item 12, it says, "The taxpayers contend that the Government is not entitled to the presumption of correctness and did not make a prima facie case because it did not prove that it sent the notices of deficiency as required by Section 6861(b)."

Then I said, "I do not believe the failure to introduce the notice of deficiency is fatal to the jeopardy assessment."

So I acknowledged that the notice of deficiency was not introduced in evidence.

Mr. Moore: That's correct.

Mr. Biggins: I acknowledged it.

The Court: Yes.

Mr. Biggins: There's no dispute about that.

The Court: Now, Jim's point is that it wasn't introduced, and that goes further than notification. It goes to the very basis of the Government's claim because it contained the opening net

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worth which he asserts is essential to the Government's case.

Am I setting forth your —

Mr. Moore: I would recite the argument a little differently, but you have grasped exactly what we're saying. We're saying "Can that certificate of jeopardy assessment alone have that presumption?"

Where the Court has not been provided by the Government with the method in which that tax was determined and where the Government has conceded there are substantial errors in it and where there is not a method from which a correct tax can be computed.

Now, those are the three items that we've covered, and they're legal issues primarily. And that is where we're coming from. Nobody is arguing about whether we received it or not.

The question is whether the Government made an issue of it, and they did not make an issue of it because they did not introduce it in evidence, and they chose to rely on the presumption, and that's clear from the record.

And, you know, that was their theory of the case. And Mr. Biggins can say it was to save time, and perhaps that's correct.

We would contend, if that was an issue on

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appeal, that it had to do with their "golden goose" theory and the problems they had with attributing corporate income to the tax.

But we don't want to wallow in that, and we haven't appealed that issue.

We're not arguing about the correctness or incorrectness of the net worth. We're arguing about the incorrectness of the jeopardy assessment which was put in. That's all.

The Court: Let me refer you to Page 57, Note 10, in which I said: "Because the Government relied on the presumption of correctness, it did not introduce evidence to prove each item of unreported income. In its post trial brief, however, the Government sought to use evidence submitted for a limited purpose to support the correctness of the Commissioner's determination. The taxpayers moved to strike parts of the Government's brief, asserting that the Government indirectly relied on evidence which had been admitted solely on the issue of fraud. I will not discuss each objection. I merely repeat what I said at the trial. The Government may rely on any evidence to defend the integrity of the Commissioner's determination against the taxpayers' attack. The Government may not, however, rely on evidence admitted

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on the issue of fraud to prove specific items of tax liability."

Mr. Moore: Again, that's our understanding of how how the case went. That's what it seems to say in the transcript.

The Court: Now, in addition, in my opinion, I discussed the opening net worth, didn't I?

Mr. Biggins: Yes. Yes.

Mr. Moore: Yes, you did.

The Court: And you say that that was improper because the record wasn't there?

Mr. Moore: It was — it was not in the record, Your Honor.

The Court: Well, what about my statement, "The Government may rely on any evidence to defend the integrity of the Commissioner's determination against the taxpayers' attack"?

Mr. Moore: We're not — again, we've specifically said in our issues on appeal that we are not relying on the issues raised in the summary judgment motion on the integrity of the audit.

And the Court itself has distinguished I think as well as I can say it between the issues we're talking about, Judge.

We got — this is what? 1975, I guess.

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"The Court: Maybe I'd better talk about the evidence in this case. The Government decided a long time ago that it was going to make a deficiency assessment. They filed the deficiency certificate showing that Mr. Stonehill owed $12 million in taxes and Mr. Brooks some eight or nine million dollars. Instead of proving specific items of omissions, they elected to go on the theory of regularity and accuracy of this deficiency assessment."

(Counsel continues reading from transcript.)

"A great part of the income of both Stonehill and Brooks were not the individual income of Stonehill and Brooks. The Government recognizes at least in the community property hearing that less than one-half of the amount claimed was actually due. The Government came in and relied on the presumption for the purposes of showing fraud, I think the Government must show. I permitted them to introduce the testimony of Mr. Ragland and also to show evidence solely for the purpose of showing fraud.

"The Government earlier said they wanted to show that Mr. Ragland did a careful job. It's admitted he did a careful job. But it is alleged he didn't consider or didn't make available any documents.

"Then the Governme rests and the Defendant

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moved for summary judgment on that ground, that they can't rely on the accuracy of the assessment."

The distinction is we're not arguing about the integrity of Mr. Ragland's computations. They are not in evidence, except to the extent that they are in the fraud portion of the trial.

What we are saying, as we get through the various subcategories, is that the Government made a unilateral determination, apparently based on net worth rather than records, and that is something that the Court of Appeals can take into account in determining the presumption of correctness continues to attach. And that's all we are really appealing.

I think if we do as Mr. Biggins suggests, we will end up in the Court of Appeals arguing about the Government's method of net worth computation, whether they did attribute income of the corporation to the individual and all of those things. And that is one of the principal reasons why the Government didn't introduce the net worth and why we didn't have a four month trial, because they were prepared to rely on the presumption.

And the legal question is now can they do that? And that is in a nutshell what it's all about.

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The Court: If you introduced the net worth statement, would you have been required to prove each item of receipts and expenditures and —

Mr. Moore: Well, at least each item, I think, Judge, would have been subject to attack. Now, whether — what

their burden was, certainly, they would have had the burden of opening net worth and closing net worth at the end of each calendar period. I don't think there's any question about that.

The Court: Well, let me ask Arthur some questions.

Mr. Moore: I'm sorry.

The Court: Now, as I read my opinion, and you listened to the discussion — (Pause) All right.

Are you through?

Mr. Alford: Sorry, Your Honor.

The Court: All right. I conclude that the Government intended to rely on the assessment, the jeopardy assessment.

Mr. Biggins: That's correct.

The Court: Is it your contention that the mere making of the assessment and notification of the taxpayer is sufficient to prove integrity and veracity —

Mr. Biggins: Integrity and veracity?

The Court: Yes.

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Mr. Biggins: And the notice includes the net worth determination, of course. The computations are attached to the notice of deficiency, as acknowledged.

The Court: All right. But the taxpayers say that it was necessary for you to offer the net worth statement.

Mr. Biggins: We think it was not. May I show you some pages of history?

The Court: Wait a minute. You say that it's not necessary to admit the net worth statement, and that in any event, it was not necessary for you to prove the facts set forth in the net worth statement.

Now, what do you say to that?

Mr. Moore: Judge, I think we're just way off the track. We're here to argue what the record should be on appeal. We're conceding that facts are pertinent to the

issues on appeal. The Government hasn't cross appealed. We've designated those issues. We're not arguing about transcript references now. There is no argument between Mr. Biggins and us as to whether or not that was an exhibit in the trial. It simply was not an exhibit at the trial. He has not designated any transcript reference that makes it an exhibit at the trial. We're not arguing about that. It simply was not.

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What we're arguing about really is whether a bunch of colloquy of counsel or a bunch of stuff that was admitted for fraud only should go — should be added to what we've designated.

And I — you know, the way we approached it in the Court of Appeals, to try to save them the effort of doing what Mr. Biggins and we have done, is to by affidavit, in this case Mr. Foley's affidavit, show in each case what was in the record that we did not designate and what it consisted of.

Now, Mr. Biggins has come back with a brief that cites excerpts. We have prepared last night, and I don't know what time Dick finished —

Mr. Foley: Nine o'clock.

Mr. Moore: — but we prepared last night another affidavit which takes each item designated and excerpted by Mr. Biggins. We've taken the transcript references. We've read the transcripts, and we've put in affidavit form the reasons that those are not material to the issues on appeal, or in many cases have already been designated by us as a part of the transcript.

Now, we tried to get the Government to approach the thing in the Court of Appeals and here by the simple expediency of filing an affidavit saying

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why this was relevant or not relevant on the appeal.

I agree that the Court should go through our issues so that it has an understanding and that Mr. Biggins has an understanding of the issues that he's raised.

But simply put, Judge, we have designated all of the transcript references that bear on the presumption and bear on the computation of tax and the entire transcript of the —

The Court: I realize that. But, you see, the point I want to make is that if Biggins thinks that it's necessary for him that he do certain things, or that even though it wasn't introduced, there is an alternative upon which he may rely, I think he's entitled to do that.

Mr. Moore: I agree, if there's some record there on a legal theory, that he's entitled to rely. Fine, Judge.

On a point that we've attacked. The Government has not cross appealed.

The Court: Well, that wouldn't make any difference. Why should the Government cross appeal? They won everything in the court below, didn't they?

Mr. Moore: No, they lost —

Mr. Biggins: Practically.

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Mr. Moore: — on some substantial issues, including community property, including —

The Court: They didn't win on that. I mean they conceded that. And the $10 million, they were directed by the State Department to concede that this bribe should have been accepted. They're not going to appeal that because the State Department told him not to appeal. I mean he's going to admit it.

Now as I understand this case, the Government was relying on the jeopardy assessment, and admits the com-

munity property deduction. Let's use a better word than bribe. What is it? The payment for the tobacco —

Mr. Foley: Amortization of the —

Mr. Moore: Well, it's what they paid for the barter permit.

The Court: Yes. That's right. And the third is that blue book payment. And I held that the Government was right, that the community property is a question of law, and they lost on that, but it doesn't effect the integrity of the assessment.

I held that there was reasonable grounds for the Government not to put in the amount paid for the barter permit in the first instance. And I don't recall the basis of the blue book because that came very

quickly and incidentally.

But apparently, I also held that that doesn't effect the integrity.

Now, as I understand it, they say that what I did was incorrect because the original net worth was not introduced in evidence. Now, isn't that the issue in the case? And what do you need to adequately present your answer to their contention? Did I state your position correctly so far?

Mr. Moore: In part, Judge.

The Court: What else do I have to put in?

Mr. Moore: Well, it — Judge, it's not only the absence of the net worth and the notice of deficiency, but it is also the conceded errors and it also —

The Court: What are the conceded errors?

Mr. Moore: The three items that we talked about.

The Court: Yes. I already —

Mr. Moore: And the fact that without the background of the computation upon which the assessment is based, the

problem exists as to making the very adjustments that the Government has conceded have to be made.

Now, that's on —

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The Court: You know, you repeat the same thing time and again.

Mr. Moore: Well, you asked me —

The Court: And when I say that, you say "It's only partially."

Mr. Moore: Well, that's because we're still on Paragraph 1, Judge.

The Court: Now, what do you expect to do? I say that when the Government showed that there was a bribe of $3 million, that they weren't required to put it in. Do you object to that issue there? Do you say that by reason of that holding, that you can't present your case adequately?

Mr. Moore: Judge, again, what we're talking about is designation of record. We put in the record the items that you talked about.

What we're talking about now is whether that record should be supplemented by every other piece of paper in the trial which Mr. Biggins has designated.

And we're simply saying that to do so is going to get off of the track of your opinion —

The Court: Well, wait a minute. Mr. Biggins doesn't intend to put any record in on the community property, do you? He doesn't intend to put that in.

Mr. Moore: He's designated the entire record,

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Judge.

Mr. Biggins: I have not.

Mr. Moore: Well, the Government has designated it.

Mr. Biggins: No, the Government has not.

The Court: All right. Whatever he has done —

Mr. Biggins: To start with, show me where we've designated in the trial on suppression of evidence held before Judge Westover.

Mr. Moore: That's a different case.

Mr. Alford: That wasn't the question.

Mr. Moore: That's Stonehill v. U. S. That isn't U. S. v. Stonehill.

The Court: Let me ask you a question. Whatever you objected to before, are you willing to eliminate all reference to community property?

Mr. Biggins: Yes.

The Court: All right. He's willing to do that.

Mr. Moore: Well, I guess maybe— let me ask Mr. Biggins this: In reading your memo, I couldn't tell whether the excerpts you put in as an appendix were the additional material you wanted or simply selected vignettes that indicated that everything

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else ought to go in because those existed.

If you designated in your memorandum the additional material that you want to put in, then I can tell you that some of it is already in. And I can address the rest of it if that's appropriate, Arthur.

You know, it's simply that I don't see any good reason why four hearings or three hearings on pretrial discovery or settlement conferences or some of that stuff that occurred way back when ought to go to the Ninth Circuit Court of Appeals. I just don't understand that. And I think we have designated —

The Court: Well, this is what I've been trying to do all the time. And I asked both of you, insofar as the community property is concerned, do you want it in the record?

Mr. Moore: We have designated the appropriate portion of it.

The Court: Just answer the question.

Mr. Moore: I think sufficient to show that it was determined in favor of the taxpayer prior to the trial in 1975. That's all we want. That's all we need. We need to have some —

The Court: Well, why don't you stipulate to

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that?

Mr. Moore: Well, we — I guess we can. But —

The Court: You are the one who is complaining about the size of the record. And every time I try to get you to say that you don't need something for the record, you want to put it in and you blame Biggins about it.

Mr. Moore: Judge, I thought we were here today on our motion to strike. If we want to delete the record further from what we've designated, if we can do that, we will cooperate to do that.

We'll cut it down even more than we've designated.

The Court: Well, let's follow the same standard. If you want stuff on the community property, I will let him put in the stuff on community property.

Mr. Moore: I have no objection to that. We've designated everything. He's not complaining about that, Judge. He's not complaining about community property.

The Court: That is what I am trying to find out.

Now, what about the question of the barter permit?

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Mr. Moore: Judge, all of that is in the designation of the record which we made on the computation of the tax post-opinion. It's all in that transcript. We've put it all in. We've designated it all. There are no objections.

The Court: All right. Do you want any more on the barter permit?

Mr. Biggins: I don't think so. But can I —

The Court: All right.

Mr. Biggins: My understanding of the exhibits they've designated, it doesn't include the exhibit on the barter bribe. Does it?

Mr. Moore: We have —

Mr. Biggins: I thought that was a new —

Mr. Moore: We have enough on the record on the hearing on the computation of tax. We're raising legal issues. We're trying — we're taking the position, right or wrong, that, "You cannot compute the correct tax mathematically because . .". We're not arguing about anything else on that issue.

The Court: All right. I say that if you contend that the assessment is invalid because it didn't take into consideration the barter permit as one item, and then you designate a part of the record which shows that credit was given for the barter

permit in the computations, you have to permit the Government to put in the reasons why and that portion of the record which shows why they didn't give credit for the barter permit and why they ultimately gave permission for the barter permit.

Mr. Moore: Judge, I don't argue with that, but there isn't any such record that hasn't been designated.

The Court: Have you designated that portion?

Mr. Moore: We have designated the entire trial except the issue of fraud. We've designated the entire hearing on community property and the entire hearing on the tax computation.

What we haven't designated is all of the pretrial stuff before Westover and so forth on —

The Court: Well, if he's done that —

Mr. Biggins: He hasn't.

The Court: — what else does he want?

Mr. Biggins: We've tried to include the testimony of Agent Ragland, the prepared testimony and oral testimony, as directed by the Court. And that —

Mr. Moore: That was on the issue of fraud.

Mr. Biggins: Well, and it's the integrity of the audit. But may I finish, Mr. Moore?

Mr. Alford: Either one of which aren't to be

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appealed.

Mr. Biggins: May I finish?

Mr. Moore: Anything you want, Arthur.

Mr. Biggins: What they contend does not in my mind or anticipation comport with what they say.

They have stated that they are not raising on appeal the so-called suppression motion or the integrity of the audit.

Mr. Moore: The motion for summary judgment which we filed is what we're saying —

Mr. Biggins: I'm sorry for interrupting you. Go ahead.

The Court: Go ahead.

Mr. Biggins: However, the specific issue that they raise, coupled with exhibits, the issue that they raise is the erroneous jeopardy assessment attached was asserted to be determined only on the basis of those documents which were of interest to the Government in developing its case, although all of the taxpayers' record were unilaterally available to the Government.

That is an issue being raised on appeal.

Mr. Moore: That's correct.

Mr. Biggins: To me, that — I don't interrupt, Mr. Moore.

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Mr. Moore: That's correct.

Mr. Biggins: To me, that is the scope and integrity of the audit. I go from that point that they're raising on appeal to the record they have designated, and I look at the exhibits.

Exhibit A designated, deposition of Nocom; Exhibit B, letter, Powers to McKillan (ph), Nocom; C, D, E, G, H, I, sealed Exhibit K. I go through two pages of exhibits.

Every exhibit there is addresed to the scope and integrity of the audit issue and suppression. Those were the exhibits argued to this Court.

So I come down to this: Are you raising a new issue on appeal through this, or is it the same old scope and integrity of the audit? Notwithstanding, we see what they've included. Nocom, Holly, et cetera, et cetera, et cetera.

The wire tap exhibit. They wouldn't strike in its entirety Ragland's prepared and oral testimony going to the scope and integrity of the audit.

Now, they can't have it both ways —

Mr. Moore: Well, I'll tell —

Mr. Biggins: — more than that.

Mr. Moore: Excuse me. I thought you were

Mr. Biggins: I think they misstated this Court's holding on the burden of proof.

The Court: Well, they are entitled to do that. (Laughter.)

Mr. Moore: Well, —

Mr. Biggins: And they have.

The Court: All right. They can, and probably they will do it in the Court of Appeals before I'm through. But I am not worried about that.

I'm worried about seeing to it that both sides have the privilege of presenting their case the way they want to. But I don't want a lot of extraneous things. This is the

reason why I have been telling you, Jim, you talk one way one time and another way the other time.

Now, if —

Mr. Moore: Well, may I —

The Court: Wait a minute.

Mr. Moore: Excuse me.

The Court: If he is attacking the deduction for the community property, and he wants to put something in the record, that's perfectly all right. Let him do that. What else do you need for the community property?

Mr. Biggins: On community property, very

little.

The Court: All right.

Mr. Biggins: The statement of Lourdes Stonehill's attorney at the time, Ted Ward, that she brought no property into the marriage, she had no separate property. And also the statement in one of the briefs that her residence was in Los Angeles.

The Court: All right. If you want to do that, that's fine. It's not very long. And that is not very important because I don't think there is very much dispute. It's a question of law.

Mr. Moore: But —

The Court: Wait a minute.

But on the question of the barter permit, where they say that that is error and that attacks the integrity of the jeopardy assessment, I'm going to hold that you have the privilege of putting in the nature of the payments for the barter permit, any evidence in the record to show when you discovered it, and also the reasons why you didn't prove it, and also the directions that were received from the State Department to admit it.

Now, you can do that, because they are relying not only on the deduction. When they were relying on the deduction, you are entitled to show why

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the deduction is made.

Mr. Moore: We have no objection to that.

The Court: All right.

Mr. Moore: That isn't the part Arthur has designated to put in. If that information is there, it's already in the record. We've designated it. We have no objection to that, Your Honor. And we don't think it's testimony. We don't think it's evidence.

We think it's statements of counsel. But nevertheless, if they want to put that in, that's fine.

The Court: Do you have it already in the record?

Mr. Moore: I think we've made all the references to those three items that —

The Court: Is that correct?

Mr. Moore: — that in terms of evidence are exhibits.

Mr. Biggins: I thought Exhibit UU was the barter bribe, and I don't see UU. I see Item 34 as TT —

Mr. Moore: If you want it to go in —

Mr. Biggins: And 35 is VV.

Mr. Moore: If you missed that —

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The Court: Well, he's willing to do it now.

Mr. Biggins: What I anticipate on appeal, Your Honor, is when reference is made to the net worth file and the net worth determination, they stand back and say, "What net worth audit?", like it never happened.

Now, we talked a little about the Court's holding here on the tax liability computation. You refered to Page 57. "The Commissioner used the net worth method to compute the tax worth method." And they did it. I take it there is no dispute. Is there a dispute?

Mr. Moore: No.

Mr. Biggins: The taxpayers' statement —

Mr. Moore: The statement by you in the record, and I have no reason to rebut that, and the information I have is that the Government used a net worth method to compute income. I don't deny it. I think we've designated sufficiently in the record to show that, Arthur. But — and I think that helps us.

But if you want to put anymore in on that, that's fine. You see, we're relying on the legal theory, Arthur. And I assumed you picked that up from us, that if you use the net worth when you have the records, that that's frowned upon by the Courts.

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And so we have said that the use of the net worth method when you have records goes to the correctness, presumption of correctness of the jeopardy assessment. We've raised that as an issue.

The Court: All right.

Mr. Moore: We have in effect said, "Yeah, they used net worth, but they didn't let us attack it because they didn't put it in evidence."

Mr. Biggins: But that's the point now, Your Honor. The bulk of this Court's opinion, Pages 57 through 62 —

The Court: I know. I know.

Mr. Biggins: — address tax liability and discusses the taxpayers' attack to the net worth.

Now, Mr. Moore, if I understand what he's saying, it's "What attack on the net worth?"

Now, if you look at Page 28 —

Mr. Moore: You're asking me to respond, and I didn't want to interrupt you.

Mr. Biggins: But the shortest statement I have on this I put as Appendix 28 to my memorandum, which is part

of their reply brief on fraud to which they attack an appendix stating their position on net worth.

Now, in that, they talk about the Defendants'

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evidence to disprove the net worth. Reading at Line 13: "The Defendants proceeded to introduce additional evidence that the assessment figures were totally incorrect through evidence that the Government had not properly computed the opening net worth."

Line 19: "Had undervalued estimate in U.S. Tobacco."

Line 20: —

Mr. Moore: You're reading from our brief on fraud?

Mr. Biggins: Yes.

Mr. Moore: I understand.

Mr. Biggins: Discussing the evidence you put in at trial —

Mr. Moore: Okay.

Mr. Biggins: Attacking the net worth.

Mr. Moore: I understand that. But that was all in the fraud trial, Your Honor, and we've designated none of those exhibits and transcripts.

Mr. Biggins: No. This is discussed by the Court as tax — the evidence on tax liability. Fraud is separately —

Mr. Moore: Because you discussed the issue of fraud.

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Mr. Biggins: No, no. The Court addresses — and maybe this is a misunderstanding — the Court addresses on Page 57 the opening net worth and a number of issues on Page —

Mr. Moore: Well, maybe —

Mr. Biggins: On Page 60, the increases in net worth.

Finally, finishing the discussion on Page 62 and then in the right-hand column, 29, starting independently with the issue of fraud.

Mr. Moore: Well, —

Mr. Biggins: The Court discussed a lot on the evidence that the taxpayers sought — did introduce to try to impeach the net worth determination.

And interestingly enough, they do not designate that part of the record.

The Court: What part of the record?

Mr. Biggins: The part of the record in the argument before the Court in their brief, on the attack on net worth, neither the transcript part or the exhibit part is included in their record on appeal.

So it would appear, unless we do something when we come up here, and our attorney says, "Net worth audit", they said, "What net worth audit?" We say, "Well, your attack on the net worth." They say,

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"What attack?" The record is —

Mr. Moore: May I be heard on that, Your Honor?

The Court: Yes.

Mr. Moore: That's important. And that is the real key I think as far as the argument between Mr. Biggins and I, —

Mr. Biggins: Yeah.

Mr. Moore: — what occurred at the trial, at least from somebody who wasn't there who reads a transcript, who reads the exhibits, what occurred — and the record is rife with it.

We got to the issue of fraud. The Government had already said, "We're relying on the presumption."

So we get to the issue of fraud. We have the Ragland testimony, presumably on the issue of fraud. We have then the accountant's testimony on behalf of the Defendants to rebut Ragland's testimony. The Court makes it clear. The record is clear that all of that was on the issue of fraud.

Now, —

Mr. Biggins: I believe it's also in context the scope and integrity —

Mr. Moore: Let me finish, please, Arthur.

Mr. Biggins: I'm sorry. Sorry.

Mr. Moore: That's the context in which this

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happens.

Now, Mr. Biggins has read from the brief of counsel on the issue of fraud. Then he's referenced the Court's opinion on the net worth. The Court was in error, in our view, respectfully, in attempting to talk about the merits of the tax assessment based upon the net worth because the Court specifically limited the testimony recited in the opinion at the trial to the issue of fraud.

And we think the Court was in error in the opinion below in attempting to determine the propriety of the tax owing based on the testimony of Mr. Ragland and the rebuttal testimony on the issue of fraud.

Now, that is where we take issue with the opinion of the Court below. Inferentially, we've raised that in the designation of issues on appeal. Mr. Biggins would like from his memorandum to put in all of the Ragland or substantially all of the Ragland testimony and to make an issue on appeal, I guess, the propriety of the net worth determination of the tax.

If that occurs, if that happens, and maybe it's in my clients' best interest, I don't know, 14 years from now, this case will not be determined, because if we're going to argue in the Court of Appeals

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what was not argued in the trial court on the propriety or correctness or golden goose theory of the net worth computation, we're going to be completely off the theory upon which the case was tried in the trial court below, and we're

only going to have bits and pieces of a record on which they can rely and we can attack.

And if we get off in that area, that's our primary concern.

The reason that we did not designate as an issue fraud — the reasons were, number one, it's irrelevant. It rises or falls with attack.

And number two, because the record in the trial court is less than clear, substantially confusing, and raises issues to which there aren't any answers to the Court of Appeals and which it would have to cause to remand.

If we are going to determine whether it's corporate income, whether it was individual income, whether the fraud records can justify or support a net worth, whether the Court of Appeals can reconstruct the net worth statement from the fraud records, and those sorts of things, we're going to be on U.S. vs. Stonehill until I'm too old to try it.

The Court: All right. Well, let's take a

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couple of minutes' recess, and then I'm going to talk.

(Whereupon a short recess took place, after which the following proceedings took place:)

The Court: Now, I agree with Jim Moore that the first issue involving the question of the deductions for the community property and for the barter permit and for the blue book is not going to create any problems. And I think if Art Biggins will just look at the designation, I think that is going to satisfy the problem. And if you want to put in one or two items, that's perfectly all right.

I also agree with Jim that the real issue involves this opening net worth statement and how it was arrived at. And I might say that I find that I wrote this opinion I think in 1975 or 1976. And not until today did I realize that they were attacking the basis of my opinion on the issue of opening net worth.

Now, Jim has pointed out that all of this evidence came in on the issue of fraud, and that I was discussing the problems of the opening net worth and the additions to it in connection with the fraud elements of the case.

Now, I don't agree with that. I may have been

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wrong, and he may have a good point on appeal.

But I notice that on the bottom of Page 58 of my opinion, I said, "I therefore hold that the taxpayers have not met their burden to prove that the Commissioner's determination on the cash they had on hand on December 31st, 1957 was either incorrect or arbitrary." And that wasn't on the issue of fraud. That was involved in the issue of the integrity of the audit and in the propriety of the assessment.

And there, I pointed out the difficulties which the Government had encountered over a period of years in getting accurate information and that they were justified in doing what they did.

Now, what does that mean? I think that where I was misled, probably the Government was misled, and therefore, I'm going to permit the Government to put in the record — I think I am anyway — those things that go to support the integrity of the audit, because as I have said, not until today have I realized that that was the real issue.

And when I discussed the position of the parties in my opinion, I pointed out what the taxpayers contend in regard to the validity of the audit.

Now, here, they've made these contentions.

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And I passed upon those contentions, and now I find out from Jim Moore that they say I never should have considered this for any purpose other than fraud. And I don't recall ever having made that argument to me before this time.

Mr. Biggins: My understanding is yours, Your Honor. And if I may, I can document it and perhaps identify the —

Mr. Moore: It's not necessary. If that is what the Judge wants to hold, that's fine.

The Court: Yes.

Mr. Moore: I have no argument. If that's the way he considers the burden, that's fine.

The Court: But I do think —

Mr. Moore: I would ask that we have the right to counterdesignate —

The Court: Oh, sure.

Mr. Moore: — after we've had a chance to see —

The Court: But I was going to say that having so held, I hope that you're not going to regard that as an invitation to put in a great deal more than you actually need to put in on this issue.

Now, whether that involves stipulations or exhibits or testimony, I'm not saying. But it seems to

me that Jim's point is this: That I could not properly consider any evidence relating to opening net worth or income from the tobacco industry or from deposits in Luxembourg or Switzerland or purchases in the United States, except on the issue of fraud, to determine the validity of the Government's figures.

So I don't think you will have to go into very much of that. And maybe you can arrive at a stipulation on some of those things.

Mr. Moore: No, Your Honor. I think it's whole hog or none. I think we're going to end up with the entire record up there, and I think that we'll just have to amend the issues and try that issue, which we don't believe was tried below.

Your Honor, I'm a little surprised both in the legal sense and the literal sense. There are so many transcript

references of the Court's statement and counsels' statement that that testimony was for the sole purpose of fraud, that I'm to hear now that it was not indicates to me that the issues on appeal will be substantially — or could be substantially different than the issues at trial.

The Court: It might be. But I am equally surprised that for five years, nobody ever called my attention to the error, the grievous error that I made

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on Pages 60, 61, 62, in which I discussed these various items.

We've discussed various aspects of the case. We arrived at figures. And no one ever called my attention to the fact that I had no right to discuss opening net worth.

Well, I forgot a couple of the pages. Starting in from 57, 58, 59, 60 and 61, the major portion of my opinion, no one ever told me until today that all of this was irrelevant to any issue that was properly before me.

Mr. Moore: I think the closing brief of counsel, Your Honor, made the same argument that we make on appeal today, concerning the viability of the presumption and the fact that that evidence was submitted for the issue of fraud only. That was made in closing briefs. Let me quote from the trial, May 27, 1975: "Mr. Biggins: Yes. Call Mr. Ragland, please. Mr. Nathan: Do we still understand the testimony is for the purpose of fraud only —

"The Court: I know those things.

"Mr. Moore: — and that the Government relied on the presumption?

"Mr. Biggins: The Government relies on the presumption of the testimony will go to fraud and to the

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integrity and scope of the audit that this man made that's been challenged.

The Court: Not for the purpose of supporting the presumption?"

Mr. Biggins: May I, Your Honor.

The Court: Go ahead.

Mr. Biggins: Your original — may I refer this time and request that we look at the document?

To my memorandum, Page 25. The Court's understanding is in accordance with my understanding. Following trial and following oral argument, taxpayers' counsel sent to the Court, with a letter of transmittal, that's on Page 25 of my memorandum. This is the transmittal, it is true, of the fraud brief.

But included in the appendix of the fraud brief, they state where I have underscored "We have added as an appendix a summary" of what? "A summary of the Defendants' position in the above case."

Now, included in that appendix, which is the last statement of the taxpayers' position, —

The Court: What page are you on?

Mr. Biggins: Page 25 of my memorandum is the letter, Your Honor.

The Court: Yes. I understand.

Mr. Biggins: Now, I took part of the appendix

that applies to net worth, which starts on Page 26.

The Court: Yes.

Mr. Biggins: And here it starts on taxpayers' counsel's position on the tax deficiency, the assessment.

First, the motion to shift burden of proof. Second, on Page 27, "The presumption did not arise because no deficiency notice or net worth statement are before the Court."

Same argument as now.

Then below, on 27, the net worth — the community property argument. But finally, on Page 22, they argue, "De-

fendants' evidence destroyed the presumption, if it survived the community property concession." This is on the net worth determination.

Now, here in this page, they summarize their contention on the net worth determination. And that is exactly what this Court is discussing on Pages 57 through 62 of its opinion. They did introduce evidence to attack the Commissioner's net worth determination. And except, and except for the bribe payment which was part of that evidence introduced, the Court sustained the Commissioner and directed us to make the tax determination in accordance with the opinion, as we did and as will have to be sustained on appeal.

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Mr. Moore: Well, to argue —

Mr. Biggins: It was not restricted to fraud.

The Court: All right.

Mr. Biggins: This is a statement of their position, and here it appears on Page 28.

The Court: You want to say something? Go ahead.

Mr. Moore: No one wants to read the transcript. Everyone wants to read briefs, everyone wants to talk about what was in somebody's head.

What we've done is read the transcript. The transcript is clear as to why certain testimony was introduced, the purpose it was introduced.

The Court: Well, I'll tell you, you go ahead and put it in.

Mr. Biggins: May I add, I don't think the record is going to be as enormous. I think that part of the statements both counsel made earlier restricts some of this. My main concern is getting Ragland's testimony in, as I understand.

Mr. Moore: And 37 file cabinets.

Mr. Biggins: No, that's not true.

The Court: Well, there is more than that probably. But I can't understand how I so grievously

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misunderstood the taxpayers' case. And I can't blame them for not calling it to my attention because they're out to win the case and not to let me correct any error that I made.

But I don't know whether there is that error, and it may very well be that other portions of the record would permit you to put it in. And if you think so, you can go ahead and put it in.

Mr. Moore: Your Honor, may I also call to your attention your statement in connection with —

The Court: I read it.

Mr. Moore: In connection with the testimony that we put in and that you commented on? I spent — referring to Mr. Ragland's statement, "You spend a great deal of time on three pages picking out certain things in which most cases he's been able to find for you. And none of this evidence is being introduced for any other purpose than to show a fraudulent pattern. It is not to add up each particular item and say, 'Here, you didn't record this particular entry and this particular receipt.' Therefore you should pay taxes on that."

I think —

The Court: Sure. I don't doubt that I said that. But the difficulty with your presentation, and

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the same thing is true with his, you take out selected portions from selected witnesses. And there were a lot of other things.

Now, I didn't hear a lot of witnesses. A lot of the things came in on the record and on stipulations. And I am not in the position to say now that none of these other witnesses' statements and stipulations and exhibits are not relevant.

I'm surprised that I spent the major portion of my opinion on matters that were never admitted in evidence and nobody ever called my attention to it.

Mr. Moore: Well, all right. How do we proceed now, Your Honor. Should we simply wait for Mr. Biggins to refine his designation and then counter-designate? It that the best way to do it?

The Court: Yes, I think that.

Mr. Moore: Right now, we have a designation from the Government that says in effect, Arthur, really, substantially everything should go up. And I don't know whether you wanted to refine that or not.

If you don't and if the Court approves that, then we won't have to counterdesignate.

Mr. Biggins: Well, let me do some sorting out here. The first thing I should like is a transcript, because I believe the transcript will help me omit many

things, Jim.

Second, you say all that we —

Mr. Moore: You haven't read the transcript yet?

Mr. Foley: He means the transcript of this proceeding, Jim.

Mr. Moore: Oh, of this proceeding. Okay.

Mr. Biggins: It's a short one.

Mr. Moore: Okay.

Mr. Biggins: All we've addressed so far is the — you say the whole record. We haven't even designated the documents yet.

Mr. Moore: I'm talking about the transcripts. It seems to me that —

Mr. Biggins: Well, the great part of what we needed in the other transcripts was to make it beyond dispute that they received the notice of deficiency and that there was a long, detailed net worth audit determination.

I take it they don't dispute that. And since they don't dispute that, I can cut through it.

Mr. Moore: Well, Your Honor, here's the position we are in: We ran a very substantial risk on behalf of our clients by not designating the entire record —

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The Court: All right.

Mr. Moore: — because we can lose on appeal if the Appellate Court believes there's anything in there that we omitted.

The Court: Do you want to add anything to the record?

Mr. Moore: And it seems to me —

The Court: Sure. Go ahead.

Mr. Moore: — at this stage that maybe the best thing to do, so that it's clear and so forth, that we send everything up. And we've designated the issues and —

The Court: Well, they can do that. And if you want to specify other grounds of appeal, go ahead and do it, if you can legally do it. And if I can authorize it to be done, I'll be glad to do it.

Mr. Moore: I want the Court to know that truly in good faith, we tried to crystalize the issues and we tried to designate the portions of the transcript, in being fair to Mr. Biggins and in being fair to the appellant, that could let us argue a single issue on appeal or substantially a single issue.

To get back and wallow in all of the stuff that started 14 years ago is not appropriate.

But we do feel that we've got to look at

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whatever Mr. Biggins designates, and we've got to be protected on a counterdesignation if he takes selected excerpts which are not representative of an entire testimony or hearing.

Mr. Biggins: My understanding in checking with our appellate section, Mr. Moore, is not like the old days of do we identify a transcript of say Page 23, Line this to Page 25, Line that.

If you want those five lines, it's my understanding that the entire transcript goes us.

Am I erroneous on my understanding?

Mr. Moore: Mr. Foley can address that.

Mr. Biggins: To the Ninth Circuit?

Mr. Moore: He's probably as good an appeal man as there is.

Mr. Foley: You can designate portions, and it's often done. Portions of the transcript, to keep the record short.

Mr. Biggins: Well, that may simplify it. The Chief of the Appellate Section's understanding of the Ninth Circuit rules was otherwise. He said it was part of an innovation made to save printing costs.

Mr. Foley: Well, I don't think so. I disagree with his understanding. I can be wrong, too.

It wouldn't be the first time.

Mr. Biggins: Well, I certainly don't wish to identify or designate 200 pages when we think we only need five, which is far from our problem here.

Mr. Foley: I understand.

The Court: Now, you have submitted what you regard as an appropriate records on all the items set forth in your notice of appeal, haven't you?

Mr. Moore: Bearing on the issues —

The Court: Bearing on the issues to be presented on appeal, yes.

Mr. Moore: Yes. We've done that.

The Court: And have you designated any other portion of the record to meet his other contentions appearing on Pages 3, 4 and 5?

Mr. Biggins: We did on portions of the transcript. But my understanding is we don't identify exhibits until we see a copy of the brief. Rather than guess what might be done, we reduce it down to what is done and then try to confine the exhibits to that.

The Court: Now, they are raising the question of whether the Internal Revenue Service may charge the community property vested in non-resident alien wife of each of the taxpayers for a

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separate non-community debt.

They're going to raise that question. But do you need any record for that?

Mr. Biggins: I think the record is —

The Court: "Non-resident alien wives held as separate property."

Mr. Moore: Those are legal —

The Court: Yes.

Mr. Moore: Those are legal issue, Judge. And the amount in the record on that is extremely limited, but sufficient from our standpoint, we think. There really was very little fact-finding. We had one witness and some affidavits in San Francisco. There's so little on those issues otherwise.

Mr. Biggins: The tax returns, I never got copies of them.

Mr. Moore: I didn't either. They were put in evidence in San Francisco.

Mr. Biggins: I couldn't find them here, either.

Mr. Moore: I don't know where they are. I don't know where they are. We put in the tax returns and we put in the testimony of the lady who had custody of them. That's one of the problems with the number of hearings we've had. But may I suggest that the

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procedure be, Your Honor, that Mr. Biggins advise us and the Court if there's anything less than the 30 volumes of transcripts that he has designated, that he wants in, or otherwise, we assume that his designation is what he wants in, Westover, Stevens, and all the rest back to 1965?

The Court: Have you got all those things?

Mr. Moore: Well, that is the point we're making.

Mr. Biggins: Just excerpts from them. Not all of them, but 85 per cent of them.

Mr. Moore: This is what we're arguing about, Judge. This is the designation of the record, starting in October of '65 and the entire transcripts through 1979.

The Court: All right.

Mr. Biggins: But I said entire transcript, and that was my understanding of the new Court of Appeals —

The Court: All right. Then he will now let you know what portions. Maybe only a line or two.

Mr. Biggins: Oh, yeah. In fact, I can get rid of 85 per cent of that through the invitation I gave five minutes ago. If there's actually no dispute, as I thought there was no dispute from the

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Court's opinion, you did receive — both taxpayers did receive the notice of deficiency, and attached to that was the net worth determination.

Mr. Moore: Judge, we —

Mr. Biggins: Now, if there's no dispute on that, 85 per cent of this goes. Is there any dispute?

Mr. Moore: On what? I'm sorry. I've said the same thing in the record five times.

Mr. Biggins: Well, I want the record —

Mr. Moore: Whether the taxpayer received the -- we don't deny that the Government failed to mail the notice

of deficiency to the taxpayers under the statute. We don't deny that. We never have.

Mr. Biggins: Well, then actually, what's attached to it was the net worth determination.

Mr. Moore: Whatever was attached to it. It's not in evidence.

Mr. Biggins: Well, I know.

Mr. Moore: But whatever was attached to it.

Mr. Biggins: I know it's not in evidence. But it was never disputed before the trial came, and you got it, and the net worth determination was on it.

The Court: Well, he doesn't want to stipulate to anything.

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Mr. Moore: No, I wasn't — I wasn't there, Arthur. And I —

Mr. Biggins: But you got it.

Mr. Moore: I know that.

The Court: Well, wait a minute. You just put in that notice of deficiency to which that net worth statement is attached and anything else you want to put in to show that they received it.

Mr. Biggins: All right.

Thank you, Your Honor.

The Court: And that shouldn't be more than four.

Mr. Biggins: That gets rid of 85 per cent. That gets rid of 85 per cent.

Mr. Moore: You can do that by designating your transcript. You've already done that. You said Mr. Ragland admitted at trial —

Mr. Biggins: I think that will be enough to identify the documents when we get back there.

Mr. Alford: Your Honor, just one other point. I don't see how he can get the net worth statement when it wasn't

in evidence. He presumably has to designate part of the material that was part of the trial record.

The Court: He says it was in evidence though.

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Mr. Alford: It isn't. He's admitted it. It isn't in evidence.

Mr. Biggins: Well, this is semantics.

Mr. Alford: He admitted himself it wasn't in evidence.

Mr. Biggins: The record I think is of a larger circle than what is in evidence when there's no dispute.

Mr. Moore: Okay. So we're going to get something from Mr. Biggins on the designation, and we'll have the opportunity to cross-designate additional materials?

The Court: And you'll have the opportunity to move to strike portions of it, too.

Mr. Moore: Yeah. I understand. We can renew before Judge Browning. That was part of the order.

The Court: Now, you say 85 per cent. It might be even more.

Mr. Biggins: It might be 99 — it might be like Ivory soap, 99.4 per cent. I do need the Ragland testimony because I do think the due process issue is appealable. I can't read the issue on appeal otherwise.

Certainly, in relation — why do you have the

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Nocon deposition?

Mr. Moore: All right. We'll argue fraud on the appeal. We'll argue all these other issues.

The Court: You go ahead and argue anything you want.

Mr. Moore: I wish you designated cross-appeal or something or additional issues or whatever.

The Court: Does that mean you have to pay for this record?

Mr. Moore: I'm not — I'm hoping we don't have to pay for it, Judge, because we certainly want to designate 2,000 more pages.

The Court: How many pages have you designated?

Mr. Moore: We've designated approximately well, all of the trial except the fraud issue, the hearing on community property, and the post trial hearings to the trial. I would guess that's maybe two, three hundred pages or so.

The Court: Oh.

Mr. Biggins: May I accept that as a modification of the designation? You said you designated all of the trial?

Mr. Moore: Except the fraud. The testimony of Ragland —

Mr. Alford: The deposition will speak for

itself, I think, Mr. Biggins.

Mr. Biggins: Yes. But part of that is omitted from the —

The Court: Let me tell you something.

(Off-the-record discussion.)

Mr. Moore: What we've done, Arthur, and I'm going to give the Court a copy — would you give Art a copy of the affidavit — what we have done additionally is to take the material in Mr. Biggins' brief, and we've tried to tell him by Mr. Foley's affidavit where that's already been designated or why it's inappropriate to designate it. And it may be helpful to you, at least the portion of it that says we've already designated that, and you don't need it.

Mr. Biggins: I'll certainly make a good faith effort, Jim. And I think in spite of our sitting on opposite sides of the table, we've never disputed what is in good faith.

Mr. Moore: Well, I'd like to make it a clear-cut legal issue on appeal.

Mr. Biggins: I would too.

Mr. Moore: And it's a darned interesting issue.

Mr. Biggins: The integrity of the audit problems.

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The Court: I've been wrong. I have been wrong so many times in my life, that this won't be the first one.

Mr. Moore: Well, not that often, Judge. My biggest regret is when you're wrong when you find for me.

The Court: All right.

Mr. Biggins: It will be a week. I've got to stop off in Idaho. I won't be back —

Mr. Moore: Well, I guess — it's gone 14 years, and I guess we can wait a little while longer.

Mr. Foley: I think it's actually 16 years now, Jim.

Mr. Biggins: It is.

Mr. Moore: Well, I tried to cut it down.

(An off-the-record discussion took place, after which there were no further proceedings.)

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IN THE

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

I, the undersigned, Joseph F. McCloskey, III, an Official Court Reporter of the United States District Court for the District of Oregon, do hereby certify that I reported in Stenotypy the proceedings occurring in the transcript appended hereto; that I thereafter caused my stenotype notes, so taken, to be reduced to typewriting under my direction; and that the foregoing and hereto attached pages of typewritten matter, numbered 1 to 87, both inclusive, constitutes a full, true and accurate record of said proceedings so reported by me in Stenotypy, to the best of my skill and ability, as aforesaid.

Dated at Portland, Oregon, on this the 29th day of May, 1981.

(s) Joseph F. McCloskey
Joseph F. McCloskey, III, R.P.R.,
Official Court Reporter

APPENDIX D

EXCERPTS FROM RECORD OF TRIAL AND PRIOR PROCEEDINGS BEFORE DISTRICT COURT

1. *May 27, 1975 (Trial)*

"MR. NATHAN: Your Honor, all this is perfectly fine. I think we are not talking about anything that has not happened before. The Government had the choice, and I think they have made the choice, whether to proceed on this original net worth computation and fall short of it; but if they do, I argue to Your Honor, they are not aided by the presumption; and they have to prove that we owe some taxes. How they are doing it is up to them.

"THE COURT: I told them that already. But insofar as any stipulation or concession you made, I am going to construe that as applying only to the community property here.

"MR. BIGGINS: Thank you, Your Honor. On the case in chief, *we will go on the presumption* because of the enormous quantity of boxes on there, to proceed now on the net worth method, would be a trial of two or three months . . ." (RT 20-21) [Emphasis supplied.]

* * * *

2. *March 29, 1976 (Post Trial).*

"MR. RAND: If you want to, go ahead and do it. It seems to me you are going to have to stand on your presumption or you are going to have to put in all your evidence.

* * * *

"THE COURT: Well, I think, Mr. Biggins, that merely shows that you had two options at that time. You could stand on the presumption or you could put in all your evidence.

"MR. BIGGINS: I understood both those options, Your Honor, yes. *I was confronted with a three or four-month trial or could go on the presumption and I made my decision and I am stuck with it.*" (RT 92. [Emphasis supplied.]

* * * *

3. *May 5, 1978 (Post-Trial)*

"THE COURT: Let me tell you something. It may be impossible and if that's the case, then maybe we can't levy any taxes. But I thought that what *I decided is that the levy and the assessment imports that there is a presumption of correctness.*" (RT 33) [Emphasis supplied.]

"* * * * *.

"MR. RAND: Well, what happened at the trial. You see, Judge — maybe I'm wrong. I wish the Court would tell me. *We went into trial and Mr. Biggins put in his bare assessment, and then he rested.*

"THE COURT: *Yes.*

"MR. RAND: *He rested.*

"THE COURT: *Yes.*" (RT 45). [Emphasis supplied.]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

v.

HARRY S. STONEHILL,
ROBERT P. BROOKS,

Petitioners.

CERTIFICATE OF SERVICE OF
PETITION FOR WRIT OF CERTIORARI
BY HARRY S. STONEHILL AND ROBERT P. BROOKS
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I, H. DAVID HERMANSDORFER, a member of the Bar of the Supreme Court of the United States, and counsel of record for Petitioner, Harry S. Stonehill, and Petitioner, Robert P. Brooks, hereby certify pursuant to Rule 28.5, Supreme Court Rules, that I served three (3) certified true copies of the within Petition for Writ of Certiorari on behalf of Petitioners, Harry S. Stonehill and Robert P. Brooks, on the 26. day of March, 1985, by depositing said copies in the United States Post Office, Ashland, Kentucky, with first-class postage prepaid, to the following persons at the following last known addresses thereof, these persons being counsel for all parties represented in the proceedings below:

Jack McCarthy
Glenn L. Archer, Jr.
Attorneys, Tax Division
Department of Justice
Washington, D. C. 20530
Telephone (202) 633-3361
Attorneys for the United States of America

In addition, pursuant to Rule 28.4, Supreme Court Rules, I also served the Solicitor General by depositing three (3) certified true copies of the aforementioned Petition for Writ of Certiorari on behalf of Petitioners, Harry S. Stonehill and Robert P. Brooks, in the United States Post Office, University Station, on the 26 day of March, 1985, duly addressed to:

Rex E. Lee, Office of the Solicitor General
Department of Justice, Room 5514
10th & Pennsylvania Avenue, N.W.
Washington, D. C. 20543
Telephone: (202) 252-3000

A form of entry of appearance will be forwarded to us by the Clerk of the Supreme Court upon receipt of the Petition.

/s/

H. DAVID HERMANSDORFER
Counsel for Petitioners

A true copy of the original.

/s/

H. DAVID HERMANSDORFER